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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 199

THE CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT, a public corporation, *Petitioner*,

v.

FEDERAL POWER COMMISSION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

WENDELL BERGE,
261 Constitution Avenue, N. W.,
Washington 1, D. C.,
Counsel for Petitioner.

Of Counsel:
R. O. CANADAY,
Hastings, Nebraska.
P. E. BOSLAUGH,
Hastings, Nebraska.
M. E. CROSBY,
North Platte, Nebraska.
ROBERT FLOBY,
Columbus, Nebraska.

July, 1947.

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THE CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT, a public corporation, *Petitioner*,

v.

FEDERAL POWER COMMISSION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

The Central Nebraska Public Power and Irrigation District, a public corporation, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered in the above-entitled case on April 18, 1947.

OPINION BELOW.

The opinion of the Circuit Court of Appeals (R. 263-272) is reported in 160 F. (2d) 782.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on April 18, 1947 (R. 273). The jurisdiction of this Court is invoked under Section 313 (b) of the Federal Power Act, 49 Stat. 838, 860, 16 U. S. C. 825*l* (b) and Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTE INVOLVED.

Section 10(e) of the Federal Power Act of June 10, 1920, c. 285, 41 Stat. 1063, 1069 as amended by the Act of August 26, 1935, c. 687, Title II, 49 Stat. 838, 843, 16 U. S. C. 803(e) provides in part:

> "That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this Part; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require . . . Provided further, that licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; . . ."

QUESTIONS PRESENTED.

1. Whether a municipal licensee under the Federal Power Act is entitled to exemption from the payment of annual charges under Section 10(e) of that Act by reason of the fact that all its sales of power are made pursuant to state statutes authorizing such sale and requiring all excess of revenues received above costs to be returned to consumers by way of lower rates or increased services.

2. Whether a municipality upon acceptance of a license issued pursuant to the Federal Power Act is thereafter estopped to contest the constitutionality of Section 10(e) of the Federal Power Act.

STATEMENT.

Petitioner, The Central Nebraska Public Power and Irrigation District is a public corporation and political subdivision of the State of Nebraska, organized pursuant to Chapter 70, Article 7, Nebraska Compiled Statutes, Supp., 1941, as amended by Article 6, Chapter 70, Revised Statutes 1943. Petitioner is a municipality and licensee under the Federal Power Act (R. 220-221).

Petitioner operates an irrigation project on the Platte River and its tributaries in Nebraska. Under license from the Federal Power Commission, Petitioner operates hydroelectric generating plants and electric transmission systems in connection with its irrigation project. Since May 1, 1940, petitioner, the Platte Valley Public Power and Irrigation District and the Loup River Public Power District have, by agreement, interconnected transmission lines and pooled their power (R. 59). The power thus pooled is sold at wholesale for resale by the purchasers to the ultimate consumer. Revenues received from such sales are distributed among the parties to the agreement in accordance with prescribed formulae (R. 73, 89). Under this agreement petitioner realized $106,320.01 in 1942 and $263,905.53 in

1943 (R. 235) after payment of operating expenses and provision for interest, depreciation and accrual for bond redemption premiums.

The Nebraska statute under which petitioner is organized requires that rates for services shall be so fixed as to confer upon and distribute among the users and consumers of the services the benefits of any profitable operation and conduct of its business.[1] The effect of this limitation is to preclude the use of any excess of revenue over costs for any purpose other than lowering rates or increasing services rendered by petitioner. In accordance with this limitation, the net balances for 1942 and 1943 were set aside by petitioner for future bond redemption (R. 236-237). The reduction in debt and fixed charges resulting from the redemption of indebtedness of the facilities is one of the methods by which rate reduction may be made possible by a municipality, and the profitable operation thus conferred upon the users and consumers.

In April 3, 1943, petitioner filed with the Commission application for exemption from annual charges for the year 1942 asserting that its sales of electric power had been made to the public without profit, and that such sales constituted a use of the power by petitioner, a municipality, for municipal purposes within the meaning of the exempting provisos of Section 10(e) of the Federal Power Act (R. 166-178, 233-234). Similar application for exemption

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[1]Section 70-713 C. S. Supp., 1941, provides in part: "Rates and Charges, Powers of Board of Directors, Lease or Alienation of Franchises and Physical Properties Prohibited, a. The board of directors of any district organized under this Act, shall have the power and be required to and shall fix, establish and collect adequate rates, tolls, rents and other charges for electrical energy, water service, water storage and for any and all other commodities, services, or facilities sold, furnished or supplied by the district, which rates, tolls, rents and charges shall be fair, reasonable, non-discriminatory, and so adjusted as, in a fair and equitable manner, to confer upon and distribute among the users and consumers of commodities and services furnished or sold by the district, the benefits of a successful and profitable operation and conduct of the business of the district."

was made by petitioner on April 3, 1944, covering the year 1943 (R. 207-219, 233-234). Both applications were denied by the Commission and annual charges were assessed in the amount of $3,922.15 for 1942 (R. 185) and in the amount of $7,344.10 for 1943 (R. 222). Petitioner requested rehearing on the applications (R. 186, 222). Rehearing was granted and by order of the Commission hearings on the applications were consolidated in a single proceeding (R. 228-229). Thereafter, the Commission, two Commissioners dissenting, filed an opinion denying the applications for exemption (R. 233-257), and entered an order requiring payment of the annual charges (R. 257-259). The Commission refused to consider the additional contention made by petitioner that Section 10(e) of the Federal Power Act conferring upon the Commission authority to fix reasonable annual charges to be paid by licensees was unconstitutional (R. 242 n. 6).

On petition to review the Commission's order, the court below held that petitioner's operations were such as were not entitled to exemption under Section 10(e) of the Federal Power Act. In reaching this conclusion, the court held that the receipt of revenues in excess of costs constituted "profits" from petitioner's sales of power to the public and that such profits precluded exemption under the proviso of Section 10(e) of the Federal Power Act exempting licensees from annual charges to the extent power is sold to the public "without profit." The court further held that the sale of power by a municipality did not constitute a use of the power for municipal purposes under the further proviso of Section 10(e) of the Federal Power Act exempting licensees from annual charges to the extent power is used by a municipality for municipal purposes. The court further held that the petitioner is estopped from asserting that Section 10(e) is unconstitutional. The court, accordingly, sustained the order of the Commission (R. 262-272).

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred—

(1) In holding that sales of power by a municipal licensee producing an excess of revenues over costs, where such excess revenues may be used only for the benefit of consumers in the form of lower rates or increased service, are not sales to the public without profit within Section 10(e) of the Federal Power Act;

(2) In holding that the sale of power by a municipality is not a use of such power for municipal purposes within Section 10(e) of the Federal Power Act;

(3) In holding that a licensee under the Federal Power Act is estopped to challenge the constitutionality of Section 10(e) of that Act which gives authority to the Federal Power Commission to assess reasonable annual charges against such licensees;[2]

(4) In failing to hold that the power conferred upon the Federal Power Commission by Section 10(e) of the Federal Power Act to assess annual charges against licensees amounts to an unconstitutional delegation of legislative powers reserved to Congress by Article I, Section 1, of the Constitution;

(5) In failing to hold that the power conferred upon the Federal Power Commission by Section 10(e) of the Federal Power Act to assess annual charges against licensees amounts to an unconstitutional delegation of the power

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[2] It is apparent that in so holding the court below did not reach the important questions going to the Constitutional validity of the Section. The petitioner, however, submits that this Court has the power in this case to rule upon the constitutional questions regarding Section 10(e) of the Federal Power Act. See: *Scott* v. *Sanford*, 19 How. 393, 428-429; *Cardillo* v. *Liberty Mutual Insurance Company*, No. 265 October Term 1946 decided March 10, 1947, 67 Sup. Ct. 801. The grave importance of these questions in the administration of the Act and their implications upon the operations of all licensees require that they be settled by a decision of this Court.

reserved to Congress by Article I, Section 8, of the Constitution to lay and collect taxes;

(6) In sustaining the order of the Federal Power Commission.

REASONS FOR GRANTING THE WRIT.

I.

Two questions are presented as to the meaning of the exempting provisos of Section 10(e) of the Federal Power Act which are of importance to all publicly owned power developments licensed under that Act and which have not been, but should be, settled by this Court. The first of these relates to the proviso granting exemption to the extent power is sold to the public "without profit" and the second deals with the exemption provided where power is used by the municipality for municipal purposes.

The decision below is the first by any court dealing with the application of the exemptions for state and municipal licensees from annual charges assessed by the Federal Power Commission under Section 10(e). It is of grave importance to such licensees in the conduct of their operations that the questions raised in this case, which led to two dissenting opinions in the Federal Power Commission, should be set at rest by decision of this Court.

Annual charges assessed by the Federal Power Commission against the licensee are based upon a flat charge per horsepower of installed authorized capacity, plus a flat charge per thousand kilowatt hours of energy generated in the year.[3]

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[3] Article 15 of petitioner's license reads as follows:

"Article 15. Subject to the provisions of Section 10(e) of the Act, including the proviso relating to the exemption from payment of annual charges of municipalities distributing power from a licensed project to the public without profit, the Licensee shall pay to the United States as reimbursement for the costs of administration of Part I of the Act, an annual charge of one (1) cent per horsepower on 96,500 horsepower,

1. The first question relates to that part of Section 10(e) which provides that a license issued to a State or municipality for the generation, transmission or distribution of power shall be issued and enjoyed without charge to the extent such power is "sold to the public without profit." The court below interpreted the phrase "without profit" in the light of what it termed "traditionally the concept of an entity doing business such as producing or selling."[4] In the Court's view, the exemption would not apply if, at the close of an annual accounting period, the accounts of the municipality showed a net balance of revenue over costs irrespective of the fact that the effect of the applicable State legislation is to require the municipality to return any net balance to its consumers through increased service or lower rates. We must submit that this interpretation rests on a misconception of the intent and purposes of the exemption and that the court, by reason of this misconception, erroneously interpreted the proviso respecting sales "without profit".

Profit, in the traditional and usual sense, is the measure of return to capital investors in private enterprise and ordinarily consists of the earnings beyond costs. As such they represent a return to the investor for the risk assumed. This concept cannot be applied to the situation involving a publicly owned power development required

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authorized installed capacity, plus two and one-half (2½) cents per thousand kilowatt-hours for energy generated by the project during the preceding fiscal year ended June 30. Payment by the Licensee of such annual charges shall be made to the United States within 30 days from date of statement rendered by the Commission. A penalty may be imposed pursuant to the provisions of Section 17 (b) of the Act for delinquency in payment." (R. 265)

[4] The Court said: "Traditionally the concept of an entity doing business such as producing and selling includes as one of the incidents that it is making profits or losing money in given periods, and study of the Nebraska law governing the objects, organization and functioning of the petitioner in this case shows plainly that the concept including that aspect was constantly in the legislative mind." (R. 268)

to return any net balance to its consumers in the form of lower rates or increased services.

The return in such a case is not a return to the entrepreneur but to the customer. This distinction has long been recognized by this Court in cases of publicly owned facilities. *Springfield Gas & Electric Company* v. *City of Springfield,* 257 U. S. 66; *Puget Sound Power and Light Company* v. *City of Seattle,* 291 U. S. 619.

The intent of Congress in enacting the exemption contained in Section 10(e) was to exempt from charges those State and municipal licensees which in fact operated to confer the benefit of water power development on the consumer rather than to earn a return of private profit. Representative Esch, Chairman of the Select Water Power Committee speaking of the exempting language found in Section 10(e) as it was presented in the Conference Report, H. Rept. No. 910, 66th Congress, Second Session said:

> "Under the provisions of this bill no charge is levied upon a municipality or any other governmental agency or the state itself for power developed by dams constructed by such state or municipality, *and when the power is for public utility purposes and not sold for profit.* The only sources of a charge would be upon the agency, private in its character, which furnished power to public utilities or for its own use." (Emphasis supplied).[5]

Again Senator Nelson of Minnesota, the floor manager of the bill, speaking in regard to one of the earlier drafts of the exemption provision, said:

> "We provide in this amendment that all expenses which the Federal Government incurs in connection with waterpower development constructed by private capital shall be reimbursed to the Federal Government . . . Beyond that we leave the property of the State to the State, with authority in the State to determine whether a charge shall be imposed or a reduction of

[5] May 4, 1920, 59 Cong. Rec. 6524.

rates effected . . . The Federal Government is not giving away its property; it is simply consenting that the people of the several States may use their own without paying tribute to the Federal Government."[6]

It thus appears that Congress intended to impose the annual charges upon the sale of power that results in a private profit made at the expense of the consumer. This intent of Congress is clearly embodied in the purposes stated in Section 10(e) for the assessment of annual charges.

The Section in part provides that licensees shall pay annual charges "for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges . . . "

This statement of purposes is consistent only with the imposition of charges where earnings result in private profit. These purposes are not fulfilled by the assessment of charges upon a municipality whose use of power revenues is limited to lowering rates and increasing service.

The construction given to the exemption by the court below wholly renders ineffectual the expressed purposes of the exemption and the intent of Congress in its enactment. As construed below, the exemption is merely a function of accounting. Only if revenues exactly balance expenditures for costs or if operations result in a net loss would the State or municipality be entitled to claim exemption. The court conceded that this construction makes it "practically impossible" to operate in a manner so as to obtain exemption.

The Federal Power Commission has not been consistent in the application of the construction adopted below. In an effort to avoid the unworkable result implicit in the deci-

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[6] January 12, 1920, 59 Cong. Rec. 1430-1431.

sion below, the Federal Power Commission was led in one case to modify the words of the statute so as to read *substantially* without profit.[7] That decision of the Federal Power Commission is inconsistent with the result reached here.

The importance of the construction of the term "without profit" adopted below is readily apparent. Rates must be fixed for a period in advance. As fixed, the rates must reflect provision for possible contingencies beyond estimated costs. If none of the contingencies occur, the rates will necessarily return a net balance of revenues over costs of operation for a given period. If a net balance in any amount renders the licensee liable for the assessment of charges, an effort by the licensee to operate so as to qualify under the exemption would require operations at a loss thus jeopardizing the financial soundness of its entire project.

2. Section 10(e) of the Federal Power Act contains the further provision that licenses issued under that Act to States or municipalities shall be issued and enjoyed without charge to the extent such power is "used by such State or municipality for State or municipal purposes." The court below held that the use of power for a municipal purpose, within the meaning of the statutory provision, could only result from the municipality retaining the power (R. 272). This construction cannot be reconciled with the definitions of "municipality" and "municipal purposes" contained in Section 3(7) and Section 3(9) of the Federal Power Act.

Section 3(7) of the Federal Power Act defines municipality as including a city, county, irrigation district or other political subdivision of the State competent under the laws of the State to carry on the business of developing, transmitting, utilizing, or distributing power. Section 3(9) of the Federal Power Act defines municipal purposes as "all purposes within the municipal powers as defined by the

[7] In the matter of Crisp County, Georgia, Project 658 Order dated April 18, 1939.

constitution or laws of the State or by charter of the municipality." Petitioner is a municipality within the meaning of the Federal Power Act and has been so found by the Commission (R. 221). The statute of Nebraska under which petition is organized confers among others the power to sell the power generated.[8]

In the view of the court below the word *used* found in the exempting provision must be limited to a use by way of consumption. The effect of the holding is that the proviso operates only when the power is consumed by the muncipality for its own uses. Under this holding, if the power is consumed by others than the licensee, no claim for exemption on ground of use for municipal purpose can be made. This interpretation denies, in spite of the broad definition of "municipal purposes" in Section 3(9) of the Federal Power Act, that a municipal purpose may be other than a consumption of the power by the municipality itself. We submit that the broad terms of the Act demonstrate this limited construction to the erroneous. A municipality within the definition of Section 3(7) of the Federal Power Act may be a political subdivision of the state which was created solely for the generation and transmission of power, incapable of consumption itself except by way of nominal plant expenditure. To hold that nominal plant expenditure constitutes the only Municipal use by such a municipality,

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[8] Section 70-706, C. S. Supp., 1941, as amended by Act of May 27, 1943, Chapter 146, Statutes of Nebraska 1943 provides in part: "(2) Such a district may own, construct, reconstruct, purchase, lease, otherwise acquire, improve, extend, manage, use or operate any electric light and power plants, lines and systems, either within, beyond or partly within and partly beyond the boundaries of the district, and may engage in or transact business or enter into any kind of contract or arrangement with . . . (d) any body politic or corporate for any of the purposes above mentioned or for or incident to the exercise of any one or more of the foregoing powers, or for the generation, distribution, transmission, sale or purchase of electrical energy for lighting, power, heating and any and every other useful purpose whatsoever, and for any and every service involving, employing or in any manner pertaining to the use of electrical energy, by whatever means generated or distributed, . . ."

is to take an unrealistic view of the purposes and objectives of modern public power developments.

The court below felt bound to give the exemption provided for power used for municipal purposes and the exemption provided for sales to the public without profit such a construction as would grant them mutually exclusive application. The necessity for this conclusion does not appear in the terms of the Act. It rather appears that the purpose and intent of the Act require the broadest possible construction which will aid in the development of natural water power resources by public agencies. Nor are the two provisions contradictory so as to entitle the court to ignore the plain language. *United States* v. *Standard Brewery*, 251 U. S. 210, 217.

II.

1. We further submit that the court below erroneously held that petitioner was estopped to challenge the constitutionality of the grant of power to the Federal Power Commission contained in Section 10(e) of the Federal Power Act to assess "reasonable annual charges" against licensees. The court held that a licensee may not urge, as an alternative ground to exemption under the provisos of the Section, that the power conferred in the Section to assess the charges is unconstitutional.

Seemingly the court below was of opinion that a licensee under the Federal Power Act, having applied for and accepted a license containing provision for the payment of annual charges in accordance with Section 10(e) of that Act, cannot thereafter urge the unconstitutionality of that Section of the Act. The effect of the holding is to deny completely an opportunity to challenge the constitutionality of the power to assess annual charges granted in the Section.

Under prior decisions of this Court petitioner could not have raised the issue of constitutionality without applying for and accepting a license. *Smith* v. *Cahoon*, 283 U. S. 553. The mere issuance of the license conditioned upon the payment of annual charges levied under Section 10(e) did not

raise a justiciable controversy since there was only the apprehension of injury to petitioner. *Lehon* v. *City of Atlanta*, 242 U. S. 53, 56; *Cf. Rochester Telephone Corp.* v. *United States*, 307 U. S. 125. For the same reason, the petitioner would be precluded from resort to declaratory judgment on the questions. *Cf. Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 340. Petitioner's opportunity to contest the constitutional basis for the power to assess annual charges conferred upon the Federal Power Commission arose only with the assessment of charges against it. The decision of the court below is thus of importance to all licensees under the Federal Power Act. If permitted to stand, there may be no challenge made to the constitutional basis of the Act, since without a license there is no controversy to support an action and after issuance of the license and assessment of charges estoppel will be invoked.

Moreover, the power to issue licenses conferred upon the Federal Power Commission in Section 4 of the Federal Power Act is separable from Section 10(e) by the terms of Section 319. The acceptance of a benefit under Section 4, therefore, is not such a benefit which precludes a challenge to the separable provisions of Section 10(e). *Cf. Champlin Refining Company* v. *Corporation Commission of the State of Oklahoma*, 286 U. S. 210.

2. Section 10(e) of the Federal Power Act confers upon the Federal Power Commission power to fix reasonable annual charges payable by licensees "for the purpose of reimbursing the United States for the costs of the administration of this Part; and for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves . . . " We contend that the exaction for this stated purpose amounts to a tax. *United States* v. *Butler*, 297 U. S. 1-88; *United States* v. *La Franca*, 282 U. S. 568, 577. There is no relationship between annual charges and the cost of any acts or duties the Commission performs in

respect to the license. Such charges are not related in any way to the value of any services rendered the licensee. The power conferred, therefore, is urged as an unconstitutional delegation of the power of Congress to collect taxes.

3. We further urge that, if the power conferred is regarded as such as may be properly delegated to an administrative agency, the standards laid down in the Federal Power Act for the exercise of the power are so indefinite as to amount to an unconstitutional delegation of the power reserved to Congress to enact legislation. The only admonition or criteria contained in the Act is that the charges must be reasonable. There exists no standard by which the reasonableness of the assessments of the Federal Power Commission may be measured. The exercise of the power therefore, may not be reviewed or measured. The licensee is left to an indefinite liability dependent upon the discretion of the Federal Power Commission.

CONCLUSION.

For the reasons above stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

WENDELL BERGE,
261 Constitution Avenue, N. W.,
Washington 1, D. C.,
Counsel for Petitioner.

Of Counsel:
R. O. CANADAY,
Hastings, Nebraska.
P. E. BOSLAUGH,
Hastings, Nebraska.
M. E. CROSBY,
North Platte, Nebraska.
ROBERT FLORY,
Columbus, Nebraska.

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v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 263–272) is reported at 160 F. 2d 782. The opinions and order of the Commission (R. 233–259) are reported at 64 P. U. R. (N. S.) 263.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Eighth Circuit was entered on April 18,

1947 (R. 273). The petition for a writ of certiorari was filed July 9, 1947. The jurisdiction of this Court is invoked under Section 313 (b) of the Federal Power Act (49 Stat. 860, 16 U. S. C. 825–l) and Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the sales of electric power during the years 1942 and 1943 by petitioner, a municipal licensee under Part I of the Federal Power Act, were made "without profit" within the meaning of Section 10 (e) of that Act, thus exempting petitioner from the payment of annual charges, where as a result of these sales petitioner received revenues in excess of its costs in each of those years.

2. Whether the electric power, sold during the years 1942 and 1943 by petitioner, was "used * * * for * * * municipal purposes" within the meaning of the second exemptive provision of Section 10 (e) of the Act.

3. Whether petitioner is estopped to attack the constitutionality of Section 10 (e) of the Act requiring licensees to pay annual charges, where petitioner has accepted a license issued under the Act, has received the benefits thereof, and the license is conditioned, as required by the Act, upon the payment of such annual charges.

STATUTES INVOLVED

The relevant provisions of the Federal Power Act (Act of June 10, 1920, c. 285, 41 Stat. 1063, amended by the Act of August 26, 1935, c. 687, 49 Stat. 838, 16 U. S. C. 791a–825r) are set forth in the Appendix, *infra*, pp. 21–28. The relevant provisions of the Enabling Act of Nebraska (Nebraska Compled Statutes Supp. (1941)), c. 70. Art. 7, and of the amendments thereto (c. 145, 146 of the Laws for Nebraska (1943)), are set forth in the record at pp. 7–59.

STATEMENT

The facts are undisputed and may be summarized as follows:

The Central Nebraska Public Power and Irrigation District, petitioner herein, is a Nebraska public corporation, and has been a licensee under Part I of the Federal Power Act ("Act") since June 30, 1937. Under this license, petitioner is authorized to operate a hydroelectric project on the Platte River and its tributaries in Nebraska and is required by Article 15 thereof to pay annual charges, subject to the requirements of Section 10 (e) of the Act.[1]

[1] Article 15 of petitioner's license provides: "Subject to the provisions of Section 10 (e) of the Act, including the proviso relating to the exemption from payment of annual charges of municipalities distributing power from a licensed project to the public without profit, the Licensee shall pay to the United States as reimbursement for the costs of administration of Part I of the Act, an annual charge of one

On May 1, 1940, petitioner entered into an operating agreement with Loup River Public Power District and the Platte Valley Public Power and Irrigation District, both of which are also licensed under the Act (R. 59–92). Under this agreement, the power plants of the three systems have been interconnected. Substantially all of the power produced is pooled and sold through Nebraska Public Power System, a non-corporate agency owned and operated by the three parties to the agreement, and the revenues so derived distributed in accordance with prescribed formulae (R. 73, 89). As a result of these operations, petitioner realized $106,320.01 in 1942 and $263,905.53 in 1943, after payment of operating expenses, depreciation, and all income charges, including interest on its funded debt (R. 182, 218).

On April 3, 1943, petitioners filed with the Commission an application for exemption from annual charges for the year 1942, claiming that its sales of electric power had been made to the public without profit and that such sales constituted a use of the power by petitioner, a municipality, for munici-

(1) cent per horsepower on 96,500 horsepower, authorized installed capacity, plus two and one-half (2½) cents per thousand kilowatt-hours for energy generated by the project during the preceding fiscal year ended June 30. Payment by the Licensee of such annual charges shall be made to the United States within 30 days from date of statement rendered by the Commission. A penalty may be imposed pursuant to the provisions of Section 17 (b) of the Act for delinquency in payment."

pal purposes within the meaning of the exemptive provisions of Section 10 (e) of the Act (R. 166–178, 233–234). A similar application for exemption was filed on April 3, 1944, covering the year 1943 (R. 207–219, 233–234). The Commission denied both applications and assessed annual charges in the amount of $3,922.15 for 1942 and $7,344.10 for 1943 (R. 184–185, 220–222). Petitioner seasonably sought rehearing (R. 186, 222), which was granted (R. 219, 227), and the applications were consolidated in a single proceeding (R. 228–229). At the hearing, the matter was submitted to the Commission on a stipulation of facts (R. 1, 232). Subsequently, the Commission, two Commissioners dissenting, denied the applications for exemption (R. 233–257) and entered an order requiring petitioner to pay annual charges for the years in question (R. 257–259). In its opinion, the Commission refused to consider petitioner's contention that Section 10 (e) was unconstitutional (R. 242, fn. 6).

Petitioner thereafter filed a petition for review in the Circuit Court of Appeals for the Eighth Circuit (R. i–iv). After hearing, that court held that petitioner was estopped to attack the constitutionality of Section 10 (e) (R. 265–267). It further held that since, as a result of the sales of power, petitioner had received revenues in excess of costs, petitioner had not sold the power "without profit" within the meaning of the first ex-

emption of Section 10 (e) (R. 267–270). In addition, the court held that the sale of power by a municipality did not constitute use of the power for municipal purposes within the meaning of the second exemption (R. 270–272). Accordingly, the court entered an order sustaining the Commission's denial of petitioner's applications for exemption from annual charges (R. 273).

ARGUMENT

Section 10 (e) of the Federal Power Act, approved June 10, 1920, *infra*, pp. 24–25, requires the Commission to impose the condition, among others, that all holders of licenses issued under Part I of the Act, pay the United States reasonable annual charges in an amount to be fixed by the Commission for the various purposes there set out. It further provided:

> That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes.

Inasmuch as these charges are payable annually, the Commission has frequently since 1920 been called upon to consider this section, and has consistently construed the exemption, here set out, as exempting municipal licensees from annual charges only to the extent that they sold power without profit or that they retained and used power

for municipal purposes by way of consumption (R. 241–242, 243).[2] These interpretations have long since been formalized by regulation. See Sections 11.20, 11.24 of the Commission's Rules of Practice and Regulations, 18 C. F. R. 11.20, 11.24 (R. 149–151).

In acting on applications of petitioner, a municipal licensee, for exemption from these charges, the Commission followed its settled construction of Section 10 (e) and refused to grant the exemption under either of the exemptive provisions of that Section, inasmuch as petitioner had sold its power and had as a result thereof earned an excess of revenues over expenses.[3] Petitioner seeks in this petition to review the holding of the court below that the Commission properly denied the exemption and that petitioner, having accepted a license under the Act, is estopped to attack the

[2] *In the Matter of Crisp County, Georgia*, Project No. 659, order dated April 18, 1939 (Pet. 11) is not inconsistent with the Commission's established position. There, after operating at a loss for several years, the project in the year involved earned revenues slightly in excess of costs, and the annual charge, if imposed, would have amounted to 50% of such excess. The Commission did not regard the sales for that year as for profit, and accordingly granted the exemption.

[3] This long-continued construction of the statute by the agency specifically charged with the administration of the Act is entitled to great, if not conclusive weight. *Inland Waterways Corp.* v. *Young*, 309 U. S. 517, 524–525; *Gray* v. *Powell*, 314 U. S. 402, 411–412; *Labor Board* v. *Hearst Publications*, 322 U. S. 111, 130–131.

constitutionality of Section 10 (e) pursuant to which annual charges are imposed. We submit these questions were correctly decided by the court below and there is no need for review by this Court.

1. Although petitioner admittedly had an excess of earnings over expenses for the years here involved, petitioner contends that such excess is not "profit" and that it sold its power "to the public without profit" within the meaning of the first exemptive provision of Section 10 (e). It claims that the word "profit" is limited to the return to the investor in a private enterprise for risk assumed and does not include the excess earnings of a municipal enterprise. This contention in effect denies that a municipal enterprise may earn a profit, at least within the meaning of the Act.

It is clear from the face of the statute that Congress did not use the word "profit" in the restricted sense urged by petitioner, but rather in the broader sense that a municipally-owned and operated enterprise could earn a profit. The proviso clause of Section 10 (e), which deals only with State and municipal licensees, does not grant an exemption from all sales, but, rather, limits the exemption "*to the extent* [the] power is sold to the public *without* profit." [Italics supplied.] By so restricting the scope of the exemption, Congress recognized the obvious fact that many municipal licensees would sell their power with

"profit," and intended by the limitation to deny these licensees the benefit of the exception for these sales.[4]

The Congressional recognition that a municipality could earn a profit from its sales of power accords with the usual definition of "profit", which is commonly understood and applied in a broad sense to mean "the excess of income over expenditures during a given period of time."[5]

[4] As the Commission observed in its opinion (R. 235), the legislative history of the Act, while quite extensive, contains nothing to show that Congress intended a concept of municipal profit differing in any respect from that generally accepted. The correctness of this conclusion is demonstrated by the exposition of legislative intent made by petitioner (Pet. 9–10), who was able to cull only two statements which it thought supported its position. One of these was merely a paraphrase of the Conference Report made to the House, and the other a statement made in a Senate debate in respect of an earlier draft of Section 10 (e).

[5] Petitioner's suggestion that such a "definition" is impractical and imposes difficult problems of rate making is unsound. The application by the Commission of this definition has been accepted without substantial question for over 25 years. Moreover, very few municipal licensees are nonprofit enterprises and most of them set their rates with the view to earning revenues in excess of expenses and not merely to equalize them. Furthermore, the annual charge actually imposed is usually small in amount, and hence not a very important factor in the fixing of rates. For example, the annual charge for 1942 from which petitioner is claiming exemption is only $3,922.15 (R. 169), whereas its gross operating revenues for that year were $975,787.44 (R. 205) and its net income was $106,320.01 (R. 235). Similarly, the annual charge for 1943 is $7,344.10 (R. 210), the gross revenues were $1,316,004.34 (R. 121), and the net income $263,905.53 (R. 235).

Webster's New International Dictionary (2nd Ed. Unabridged, 1939); see *Rubber Company* v. *Goodyear,* 9 Wall. 788, 805; *Sioux City & Pac. R. R. Co.* v. *United States,* 110 U. S. 205, 207; *Rogers* v. *Hill,* 289 U. S. 582, 590. And under the accepted rule of statutory construction the usual (and broad) meaning of the term should properly be applied, since from the whole context of the statute, it is clear that a different meaning was not intended. *Miller* v. *Robertson,* 266 U. S. 243, 250; *DeGanay* v. *Lederer,* 250 U. S. 376, 381.

This broad definition of "profit" has become so well recognized and accepted that there are numerous decisions both before and since the passage of the Act in 1920 holding that municipal and state enterprises may make a profit. See e. g., *Henderson* v. *Young,* 119 Ky. 224; *Wagner* v. *Rock Island,* 146 Ill. 139; *Twitchell* v. *Spokane,* 55 Wash. 86; *Ray* v. *School Dist. of Lincoln,* 105 Neb. 456; *Shirk* v. *City of Lancaster,* 313 Pa. 158.[6] As the court below stated (R. 268):

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[6] *Springfield Gas & Electric Co.* v. *City of Springfield,* 257 U. S. 66, and *Puget Sound Power & Light Co.* v. *City of Seattle,* 291 U. S. 619, relied on by petitioner (Pet. 9), are not in point. Both cases involved the due process clause of the Fourteenth Amendment. In the *Springfield* case this Court held that it was proper to exempt the rates charged by a municipally owned utility from approval of the State Public Utilities Commission while requiring such approval for the rates of privately owned utilities. Although the Court discussed the differences between two enterprises, there is no indication that the Court considered publicly

> Whatever incongruity there may be etymologically in speaking of "profits" in connection with sales of power by a municipality operated in the public interest for the public benefit, the fact is that thousands of such corporate entities are in operation throughout the country now, and the structure and public operation of these entities is assimilated in so many respects to private corporate operation that it is usual and common practice to apply to them a test of profit and loss as an accepted yardstick in measurement of their efficiency and success or lack of it, and of their credit and standing. The question whether one of them is operating at a profit or loss is put constantly from many angles and causes no confusion or misunderstanding as to its intent. Traditionally the concept of an entity doing business such as producing and selling includes as one of the incidents that it is making profits or losing money in given periods, * * *.

Indeed, as detailed both by the Commission (R. 237) and the court below (R. 268–269), the Enabling Act (Nebraska Compiled Statutes

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owned utilities as incapable of earning a profit. In the *Puget Sound* case the question concerned the assessment of an annual license tax. The privately owned utility claimed that to assess such a tax against it while exempting the competing publicly owned utility was a denial of equal protection and deprivation of property without due process of law. This Court sustained the validity of the tax. Here again there was no suggestion that a municipal enterprise might not earn a profit. See 291 U. S. at 624, 625.

Supp. (1941), c. 70, Art. 7)[7] (R. 7–31) pursuant to which petitioner was created clearly contemplates that the public power districts therein authorized, such as petitioner, should be profit-making enterprises. Section 70–713 of that Act (R. 26–28) requires that the electric power rates shall be "so adjusted as * * * to confer upon and distribute among the users and consumers * * * the benefits of a successful and profitable operation and conduct of the business of the district." (R. 26–27). Section 70–709 (R. 18–20) dealing with the power to borrow or incur indebtedness prescribes that such indebtedness "shall be payable solely (1) from revenues, income, receipts and *profits* derived by the district from its operation and management * * *," (R. 18) whereas Section 70–712 (R. 22–26) limiting hypothecation of property specifically authorizes the pledging of "revenues, incomes, receipts or *profits* to secure the payment of indebtedness to the federal government" (R. 22). [Italics supplied]. The statutory provision that "the benefits of a * * * *profitable* operation" should be distributed among users and consumers and the fact that the excess over costs during 1942 and 1943 was set aside for future bond redemption hardly support petitioner's argument that the net balance is not profit. Cf.

[7] The amendments (Laws of Nebraska for 1943, ch. 145 (R. 31–41), ch. 146 (R. 41–59)) of this statute do not change or affect the language quoted in the text.

Grant v. *Hartford & N. H. R. R. Co.*, 93 U. S. 225.

Accordingly, we submit that the holding of the court below that petitioner's power was not "sold to the public without profit" within the first exemptive provision of Section 10 (e) was correct.

2. Petitioner also contends (Pet. 11) that it falls within the provision of Section 10 (e) exempting from annual charges, power "used * * * for * * * municipal purposes." This contention is not based on the claim that petitioner "used" by way of consumption any power for "municipal purposes" during the years in question.[8] Instead, petitioner urges that since it is empowered by the Nebraska law to sell the electric energy generated by it, such sales are for a "municipal purpose", and hence the power which it sells is "used * * * for * * * municipal purposes."[9]

This contention distorts the meaning of the phrase "used * * * for * * * municipal purposes", by placing all emphasis on "municipal purposes" and ignoring the word "used." While

[8] Nor could in fact any such contention be made, since petitioner sold practically all the power which it produced (R. 190).

[9] Section 3 (9) of the Act, Appendix, *infra*, p. 21, defines municipal purposes as "all purposes within municipal powers as defined by the constitution or laws of the State or by the charter of the municipality." Petitioner admittedly falls within the definition of "municipality" contained in Section 3 (7), Appendix, *infra*, p. 21.

we assume that the sale of power by petitioner is authorized by Nebraska law and hence a "municipal purpose" (else, petitioner could not sell the power), we nevertheless submit that the sale of the power is not a use for municipal purposes. Adoption of the construction urged by petitioner would render the first exemption contained in Section 10 (e) for power "sold to the public without profit" meaningless, since, as so construed, "use * * * for municipal purposes" completely encompasses all sales of power by the municipality, irrespective of profit. Inquiry into whether any profit was made on the sale for the purpose of the first exemption becomes superfluous, and the entire first exemption rendered surplusage. Such an interpretation is contrary to the cardinal rule of construction that, if possible, every word in a statute should be given effect. *Ginsberg & Sons* v. *Popkin,* 285 U. S. 204, 208; *Eyster* v. *Centennial Board of Finance,* 94 U. S. 500, 503; *Platte* v. *Union Pacific R. R. Co.,* 99 U. S. 48, 58.

"Used * * * for * * * municipal purposes" was intended to have a meaning which would prevent overlap and conflict between the exemptions, and properly construed applies only to the retention and use of the power by way of consumption for municipal purposes. Under this construction claims for exemption predicated on the sales of energy fall within the first exemptive provision, and must meet the condition that the

power be sold to the public without profit, as pointed out by the court below (R. 272):

> * * * a condition common to * * * [municipal and State licensees] is that they are all confronted with the necessary alternative of selling or not selling the power they produce * * *, and it is evident that the exemption proviso here has been framed with these alternative possibilities in view * * *. Either the licensees sell it (as the District does), and then the condition for exemption is that their sales to the public must be without profit as above discussed, or they do not sell it. If they do not sell it but retain it, then they may come within the category of those public licensees covered by the words of the proviso which "use it for municipal purposes" and are in that way distinguished from those who sell it.

Accordingly, we submit that the court below properly rejected petitioner's claim of exemption under the second exemptive provision of Section 10 (e).[10]

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[10] It is arguable from Public Law 573, 79th Cong., 2d sess., that Congress has adopted the Commission's interpretation of the proviso of Section 10 (e) as exempting from annual charges only those municipal licensees satisfying the conditions there imposed. That law related to the return from Federal authority of the Grand River Dam Project to the Grand River Dam Authority, which petitioner, in its brief below (p. 38), described as "a district formed very much like this District and for substantially the same purpose." In Section 4 of that Act, Congress provided: "The Grand

3. a. Petitioner further contends that the court below erred in holding that petitioner was estopped to attack the constitutionality of the power vested in the Commission by Section 10 (e) to assess "reasonable annual charges" against licensees. But Article 15 of the license, *supra*, pp. 3–4, fn. 1, issued petitioner in 1937, incorporated the conditions of Section 10 (e) and required the payment of annual charges in accordance with the formula which the Commission had established and followed with only insubstantial modifications since 1921. In accepting this license, petitioner was aware of the obligations it assumed and undertook to comply therewith. On the basis of this license, petitioner has obtained substantial grants and loans from the United States to construct and operate the project therein authorized and has invoked Section 21 of the Act, Appendix, *infra*, pp. 25–26, in its efforts to condemn land required for the project. *Harris* v. *Central Nebraska Public Power & Irrigation District*, 29 F. Supp. 425 (D. Neb.). Now that it has received these benefits, petitioner seeks to attack the constitutionality of Section 10 (e), bas-

River Dam Authority shall not be required to pay any annual charges under its license issued by the Federal Power Commission for the operation of the project during the period of Federal control thereof." Presumably, if the Authority would not have been required to pay annual charges when not under Federal control, there would have been no necessity to provide for its exemption during the period of Federal control.

ing its attack not on the ground that the charge is unreasonable or that Congress itself could not assess the charge, but rather on the technical ground that the charge is a tax, assessable only by Congress.

In these circumstances, we submit that the court below properly held petitioner estopped to attack the constitutionality of Section 10 (e), for, as this Court very recently held in *Fahey* v. *Mallonee*, No. 687, October Term, 1946 (decided June 23, 1947, (slip opinion, p. 9.)):

> * * * It is an elementary rule of constitutional law that one may not "retain the benefits of the Act while attacking the constitutionality of one of its important conditions." *United States* v. *San Francisco,* 310 U. S. 16, 29. As formulated by Mr. Justice Brandeis, concurring in *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 348, "The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits."

Petitioner's contention (Pet. 14) that, if petitioner be estopped, no one else would be in a position to challenge the Act, does not distinguish the instant case from *Fahey* v. *Mallonee,* since, in that case, constitutional attack on the statute was, in all probability, likewise foreclosed. As a practical matter, that is a common consequence of holding beneficiaries such as petitioner herein estopped to raise constitutional questions. See

e. g., Booth Fisheries Company v. *Industrial Commission of Wisconsin,* 271 U. S. 208; *Pierce Oil Corp.* v. *Phoenix Refg. Co.,* 259 U. S. 125.

Nor is there merit to the contention that the estoppel doctrine is inapplicable (Pet. 14), because under the separability provision (Section 319, Appendix, *infra,* p. 28), Section 10 (e) is separable from the benefits accepted by petitioner under Section 4 (Appendix, *infra,* pp. 21–23). Technical separability for the purpose of such a provision does not govern the applicability of the estoppel doctrine. And see *Fahey* v. *Mallonee, supra,* (slip opinion, p. 10). In the present case, despite the separability provision, Congress expressly provided in Section 6, Appendix, *infra,* p. 23, that each license be conditioned upon the acceptance by the licensee of the conditions of the Act, and thereby made these conditions an inseparable part of the license. Cf. *United States* v. *Appalachian Power Co.,* 311 U. S. 377, 419, 420, and fn. 65.

b. In any event we think there is no substance to petitioner's contention that Section 10 (e) is unconstitutional because it levies a tax or because of invalid delegation of power. The constitutionality of Section 10 (e) was upheld in *United States* v. *Appalachian Power Co.,* 311 U. S. 377, 419–420, 427, although the precise issues here presented were not raised. Nevertheless it is clear that the assessment of fees to cover expenses of administration is a condition of the license

reasonably related to the effectuation of the constitutional statutory policy within the test prescribed in the *Appalachian* case. The power of Congress to permit an administrative body to fix fees as an incident of administrative regulation has been upheld in other statutes. In *Hamilton* v. *Dillin*, 21 Wall. 73, 93; *United States* v. *Grimaud*, 220 U. S. 506, 522; *Varney* v. *Warehime*, 147 F. 2d 238 (C. C. A. 6), certiorari denied, 325 U. S. 882. Furthermore, although we think that clearly the provision for a license fee is not to be regarded as the imposition of a tax (*ibid; St. Louis* v. *United Railways Co.*, 210 U. S. 266, 278), the Constitution does not prohibit a proper delegation of authority with respect to matters of taxation (*Hampton & Co.* v. *United States*, 276 U. S. 394; *Marks Co.* v. *United States*, 117 F. 2d 542 (Ct. of Customs and Pat. Appeals); *Wislar* v. *United States*, 97 F. 2d 152 (Ct. of Customs and Pat. Appeals), certiorari denied, 305 U. S. 629). There is clearly no merit in petitioner's contention as to a lack of adequate standards in the requirement that the Commission shall fix "reasonable annual charges * * * for the purpose of reimbursing the United States for the costs of the administration of this Part; * * *."

CONCLUSION

The decision below is correct and there exists no conflict. The construction of the statute accords with the long-settled and consistent inter-

pretation thereof by the Commission. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

PEYTON FORD,
Assistant Attorney General.

PAUL A. SWEENEY,
MELVIN RICHTER,
Attorneys.

BRADFORD ROSS,
General Counsel.

WILLARD W. GATCHELL,
JOSEPH B. HOBBS,
Attorneys,
Federal Power Commission.

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APPENDIX

The pertinent provisions of the Federal Power Act (Act of June 10, 1920, c. 285, 41 Stat. 1063, amended by the Act of August 26, 1935, c. 687, 49 Stat. 838, 16 U. S. C. 791a–825r) follows:

SEC. 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit:

* * * * *

(7) "muncipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;

* * * * *

(9) "municipal purposes" means and includes all purposes within municipal powers as defined by the constitution or laws of the State or by the charter of the municipality;

* * * * *

SEC. 4. The Commission is hereby authorized and empowered—

* * * * *

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of construcing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and

for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided,* That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation: *Provided further,* That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of War. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further,* That in case the Commission shall find that any Government dam may be advantageously used by the United

States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further,* That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

* * * * *

SEC. 6. Licenses under this Part shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all the terms and conditions of this Act and such further conditions, if any, as the Commission shall prescribe in conformity with this Act, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this Act, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice. Copies of all licenses issued under the provisions of this Part and calling for the payment of annual charges shall be deposited with the General Accounting Office, in compliance with section 3743, Revised Statutes, as amended (U. S. C., title 41, sec. 20).

* * * * *

SEC. 10. All licenses issued under this Part shall be on the following conditions:

* * * * *

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this Part; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided,* That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 16 of the Act of June 18, 1934 (48 Stat. 984), fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: *Provided further,* That licenses for the development, transmission, or dis-

tribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than one hundred horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the Commission. In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period.

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SEC. 21. That when any licensee can not acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of im-

proving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided,* That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

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SEC. 313. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such

manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

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SEC. 319. If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

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